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87-1543

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

MILTON JOHN ROCKMAN,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Rule 104(a) of the Federal Rules of Evidence gives defendant the right to introduce relevant evidence for consideration by the trial court in its determination of preliminary questions of admissibility of co-conspirator acts and statements offered by the Government pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence?

2. Whether, after the Government has rested its case in chief, a trial court may refuse to allow a defendant to introduce through the testimony of an expert witness, previously called by the Government, relevant and dispositive evidence, which if admitted, would have required the trial court to exclude a substantial number of conditionally admitted, highly prejudicial co-conspirator acts and statements, because such acts and statements did not occur during the course of the conspiracy alleged in Count One.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Plaintiff-Appellee:
United States of America

Defendants-Appellants:
Milton John Rockman, Petitioner herein
Joseph John Aiuppa
John Peter Cerone
Angelo LaPietra
Joseph Lombardo

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The Petitioner Milton John Rockman respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on October 8, 1987.

REFERENCE TO OPINIONS IN THE COURTS BELOW

The opinion in the United States Court of Appeals for the Eighth Circuit styled *United States v. Cerone*, is officially reported at 830 F.2d 938 (8th Cir. 1987), and is reprinted as "Appendix A" to this petition *infra*, at page A-1.

A motion for reduction of sentence filed on behalf of Petitioner and all other defendants-appellants was filed in the trial court. Such motion was granted in part, as to Petitioner herein, all as more particularly set forth in the "MEMORANDUM AND

ORDER" filed in the United States District Court for the Western District of Missouri on February 2, 1988, and in the "ORDER CORRECTING THE COURT'S ORDER OF FEBRUARY 2, 1988", which was filed on February 3, 1988. These District Court Orders are reprinted as "Appendix B" to this Petition, at page B-1.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion of the United States Court of Appeals for the Eighth Circuit which affirmed the convictions of Petitioner and all other Appellants was filed on October 8, 1987.

A petition seeking rehearing by the panel and rehearing en banc which was timely filed by Petitioner herein, was denied in an Order entered at the direction of the court below, on December 15, 1987. A copy of such Order is reprinted as "Appendix C" to this petition, *infra* at page C-1.

An Order granting Petitioner an extension of time to and including March 14, 1988 to file the instant Petition for Writ of Certiorari, was granted by this Court on February 12, 1988. A copy of such Order is reprinted as "Appendix D" to this petition, at page D-1.

Jurisdiction is conferred on this Court to review the aforesaid judgment of the United States Court of Appeals for the Eighth Circuit by the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, United States Code, Section 2, provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18, United States Code, Section 371, provides:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 1952, provides:

> § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title.
>
> (c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Rule 104(a) and (b) of the Federal Rules of Evidence provides:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of

evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the evidence sufficient to support a finding of the fulfillment of the condition.

Rule 702 of the Federal Rules of Evidence provides:

Rule 702. Testimony by Experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703 of the Federal Rules of Evidence provides:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704(a) of the Federal Rules of Evidence provides:

Rule 704. Opinion on ultimate issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides:

> Rule 810. Definitions
>
> The following definitions apply under this article:
>
> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> (2) Admission by party-opponent.X The statement is offered against a party and is (E) a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy.

STATEMENT OF THE CASE

A. Procedural History

On September 30, 1983, Petitioner and fourteen others were named as defendants in an eight count indictment returned in the United States District Court for the Western District of Missouri, Western Division, at Kansas City. Petitioner was charged in Count One, pursuant to Title 18, United States Code, Section 371, with conspiracy to violate the Travel Act (Title 18, United States Code, Section 1952), and as an "aider and abettor" to Travel Act violations in each of seven substantive counts. [Title 18, United States Code, Section 2]

The jury trial of Petitioner and seven co-defendants began on September 23, 1985, and on January 21, 1986, verdicts of guilty were returned on all eight counts against Petitioner and four co-defendants who were still on trial.

Petitioner was sentenced to twenty-four years imprisonment (three years on each of the eight counts, to be served consecutively), and was fined a total of $80,000 ($10,000 on each count). The contents of the Judgment and Probation/Commitment Order has been reprinted as "Appendix E" to this Petition at page E-1. Petitioner's conviction was affirmed on appeal by the United States Court of Appeals for the Eighth Circuit in an opinion filed on October 8, 1987, and his Petition for rehearing and rehearing en banc was denied by that Court on December 15, 1988.

Pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the District Court entered a Memorandum and Order on February 2, 1988 (and on February 3, a correction thereto) which provided, *inter alia*, that Petitioner's sentences on Counts One and Two be served concurrently with each other, thereby reducing Petitioner's term of incarceration, at seventy-three years of age, to a total of twenty-one years.

B. Facts Which Are Material to Consideration of the Issues Presented Herein

1. The object of the conspiracy was inextricably tied to the "Las Vegas, Nevada . . . gaming interests of Allen R. Glick"

Count One of the indictment charged all named defendants with participation in a conspiracy to establish and maintain a hidden interest in "licensed gaming establishments in Las Vegas, Nevada, *that is, the gaming interests of Allen R. Glick, including the Stardust and Fremont Casinos* . . . in violation of Nevada gaming laws". It was alleged that the duration of this conspiracy was from "on or before January, 1974 . . . to the date of return of this indictment." [September 30, 1983]. (Emphasis added).

The description of the conspiratorial objective as the "Las Vegas, Nevada . . . gaming interests of Allen R. Glick", did not arise through inadvertence or a mere accidental quirk of draftsmanship, and this focus assumes critical importance to an evaluation of the issues presented in this Petition.

Nine times in Count One, and again in each of Counts Two through Eight, the object of the conspiracy was identified as "the gaming interests of Allen R. Glick, including the Stardust and Fremont Casinos". Two additional references in Count One described the object of the conspiracy as "the gaming interests of Allen R. Glick, including the Stardust and Fremont Casinos, *and the corporate entities controlling them*". (Emphasis added).

By charging that the conspiracy was comprehended by, and accomplished through defendants' manipulation of the "Las Vegas, Nevada . . . gaming interests of Allen R. Glick", it is clear that at the time that Allen R. Glick ceased to possess such

"gaming interests", the conspiracy alleged in the indictment would terminate.

2. The Government acknowledged that the conspiracy was intentionally limited to the "Las Vegas, Nevada . . . gaming interests of Allen R. Glick" between January, 1974 and September 30, 1983

Before trial, certain defendants (other than Petitioner) filed motions to dismiss the indictment based upon alleged "Double Jeopardy" violations. At an evidentiary hearing on such motions, lead Government counsel stated to the judge that the indictment, "which we have nicknamed the Argent indictment, talks about the gaming interests of Allen R. Glick, it doesn't talk about the Argent Corporation. It talks about the gaming interests of Allen R. Glick." He also objected to defense counsels' "mischaracterizing the indictment . . . [exclaiming that the indictment] is phrased in terms of the interests of Allen R. Glick, not the Stardust and Fremont, not the Argent Corporation." [Double Jeopardy Hearing Transcript, Vol. I, pp. 44-45].

3. The "Las Vegas, Nevada . . . gaming interests of Allen R. Glick" terminated on December 26, 1979

Uncontradicted and unequivocal trial testimony showed that:

(a) Allen R. Glick acquired his first Las Vegas, Nevada "gaming interest" in 1973;

(b) In May, 1979, the Nevada Gaming Control Board initiated procedures to revoke all of Glick's remaining licenses to conduct gaming operations in the State of Nevada;

(c) Glick subsequently entered into an agreement with the Nevada Gaming Commission whereby he stipulated to the revocation of his gaming licenses, but was allowed to continue to operate for a stated period of time for the purpose of selling such interests to a qualified buyer;

(d) The gaming interests of Allen R. Glick were revoked by the Nevada Gaming Commission on December 26, 1979;

(e) After December 26, 1979, Glick merely held notes from the purchaser of his interests, secured by second

(subordinate) trust deeds, all as earlier specifically approved by the Nevada Gaming Commission;

(f) Under Nevada gaming law, no one may possess "gaming interests" in the absence of prior licensing by the Nevada Gaming Commission; and

(g) No further gaming licenses had been issued to Allen R. Glick after December 26, 1979.

4. The indictment does not allege any specific instance of post-1979 criminal conduct

In Count One of the indictment it was alleged that the conspiracy to obtain and maintain hidden interests in the "Las Vegas, Nevada . . . gaming interests of Allen R. Glick" did not terminate until September 30, 1983 (the date upon which the indictment was returned). The seven substantive counts of the indictment were all based upon events which puportedly occurred on or before January 16, 1979.

A review of the seventy-five overt acts in furtherance of the conspiracy which were specified in Count One, discloses that seventy-four of them occurred on or before June 18, 1979. The seventy-fifth, a conversation on April 14, 1980, was not submitted to the jury for consideration.

Thus, within the four corners of the indictment, Petitioner was not personally charged with engaging in any *specific* unlawful activity *after* June 18, 1979, a date approximately four years and three *before* the conspiracy was alleged by the Government to have terminated.

5. Numerous, highly prejudicial, post-1979 co-conspirator acts and statements were conditionally admitted by the trial court

Despite repeated objections by defendants, the trial court conditionally admitted into evidence numerous statements and actions attributed to defendants and others named or identified as co-conspirators, which were made or occurred between December 26, 1979 and September 30, 1983. Such evidence was offered by the Government pursuant to the provisions of Rule

801(d)(2)(E) of the Federal Rules of Evidence. Examples of such evidence include:

(a) Assertions that Petitioner and others influence or controlled actions of the International Brotherhood of Teamsters labor union (hereinafter referred to as "IBT") between 1980 and 1983, including the elections of Roy Williams and Jackie Presser to the office of General President;

(b) Numerous (and often lengthy) recorded conversations which occurred after January 1, 1980, wherein co-conspirators (other than Petitioner) participated in discussions about influencing the election of IBT officers and retaking control of the Central States Pension Fund of the IBT. The trial judge also admitted testimony concerning the 1983 murder of Allen Dorfman, a participant in many of these conversations, who was allegedly killed to prevent him from cooperating with the government; and

(c) Unrecorded statements, attributed to Petitioner, that Las Vegas skim money was still being received in the summer of 1983 as a part of *this* conspiracy.

6. The trial court refused to admit evidence proffered by Petitioner to show that such conditionally admitted acts and statements did not occur and were not made during the course of the conspiracy alleged in Court One

After it had rested its case in chief, the trial court overruled defendants' objections and admitted the co-conspirator acts and statements introduced by the Government pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, upon the stated basis that:

> "... Evidence independent of the proffered statements in the government's case satisfied that it is more likely that (sic) not that the statement was made during the course of and in furtherance of an illegal association to which the declarant and the defendant were parties." [Trial Transcript, Vol. 53, pp. 159-160]."

Petitioner thereafter called as *his* witness, Mr. Shannon Bybee, an expert in Nevada gaming law who had testified on behalf of the Government during its case in chief. In his initial testimony,

Bybee stated that he served as a member of the Nevada Gaming Control Board from 1971 through 1975, and thereby became personally familiar with the Nevada gaming interests which Glick acquired beginning in 1973. He had also previously testified that as a specialist in "administrative gaming law", he was also aware of the circumstances underlying the revocation of Glick's gaming licenses by the Nevada Gaming Commission on December 26, 1979, and with the terms of Glick's sale of such interests, as authorized by the Gaming commission.

In response to objections by the Government, the trial court refused to allow Petitioner to ask certain hypothetical questions of Mr. Bybee, notwithstanding Petitioner's proffer, pursuant to Rule 104(a) of the Federal Rules of Evidence, that Bybee would testify that in his expert opinion, Allen R. Glick did *not* maintain "gaming interests" in the State of Nevada after his gaming licenses were revoked on December 26, 1979.

The trial court also denied Petitioner's motion, made after all parties had rested their cases, to strike all post-1979 co-conspirator acts and statements on the basis that such evidence could not have occurred or been made *during the course of* the conspiracy, because the object of that conspiracy, the "Las Vegas, Nevada . . . gaming interests of Allen R. Glick", had ceases to exist after December 26th of that year.

The trial court's final statement on the matter was to assert that Petitioner could argue his point to the jury, despite the fact that the court's ruling prevented the jurors from receiving, and therefore from considering, the dispositive expert opinion testimony from Shannon Bybee which had been proffered by Petitioner.

The Court of Appeals held that the trial court's erroneous refusal and failure to receive relevant evidence proffered by Petitioner pursuant to Rule 104(a) on the preliminary question of the admissibility of co-conspirator acts and statements, was cured by the fact that the trial court also submitted the preliminary question of admissibility for the jury. [A-25].

REASON RELIED ON FOR GRANTING THE WRIT

I

THE TRIAL COURT'S REFUSAL TO ACCEPT PETITIONER'S PROFFER, PURSUANT TO RULE 104(a), OF RELEVANT AND DISPOSITIVE EVIDENCE ON A PRELIMINARY QUESTION OF ADMISSIBILITY OF CO-CONSPIRATOR ACTS AND STATEMENTS PRESENTS ISSUES WHICH MUST BE RESOLVED BY THIS COURT IN ORDER TO PROTECT THE RIGHTS OF PETITIONER AND OTHERS TO DUE PROCESS OF LAW AND A FAIR TRIAL

Rule 104(a) of the Federal Rules of Evidence provides that certain specified preliminary questions as to the admissibility of evidence "shall be determined by the court". The Advisory Committee on Rules of Evidence and legal scholars have noted that unlike other parts of Rule 104, subsection (a) left open many significant questions about the manner in which the trial court would discharge its duty to make such preliminary findings in a variety of situations.

Professors Wright and Graham have suggested that among these questions were "which side has the burden of proof, whether the standard is a preponderance of the evidence or some higher standard, *and the right of the parties to introduce evidence and be heard on preliminary questions.*" Wright and Graham, Federal Practice and Procedure, Evidence, Vol. 21, § 5053, pp. 261-263 (1977) (emphasis added).

Likewise, Judge Weinstein has stated that the "ambiguities in Rule 104 have been most apparent when it has been used to determine preliminary fact problems created by the co-conspirators hearsay rule." 1 J. Weinstein & M. Berger, Commentary on Rules of Evidence, ¶ 104(05] at 104-39 (1976), and he has further noted that "Serious questions remain about the evidence the court may consider in making its determination, the order of proof and other procedures the court should follow, the standard of proof which should apply and appropriate instructions for the jury." *Id.* at p. 104-43.

This Court has recently resolved a number of these issues in its recent decision in *United States v. Bourjaily*, 107 S. Ct. 2775, 97 L. Ed.2d 144 (1987), including the proper standard of proof (a preponderance of the evidence), whether the trial court may examine the hearsay statements sought to be admitted in making its Rule 801(d)(2)(E) decision (yes), and whether there is a violation of the Confrontation Clause when the Rule 801(d)(2)(E) statement was made by a non-testifying co-defendant (the trial court need not make an independent inquiry into the reliability of statements which otherwise satisfy the requirements of that rule).

Two of the three issues explicitly left unresolved by the Court in *Bourjaily, supra,* pertain to the implementation of Rule 104(a); that is, "the circumstances in which the burden of coming forward to show that the proffered evidence is inadmissible is appropriately placed on the nonoffering party", and the "proper order of proof that trial courts should follow in concluding that the preponderance standard has been satisfied in an on-going trial." *Bourjaily, supra,* fn. 1. Neither of these issues is raised by Petitioner.

Petitioner suggests that it is appropriate for the Court to issue the writ sought herein in order to directly confront the question of the existence and extent of a criminal defendant's "*right*", under Rule 104(a), to present evidence for consideration by the trial court in determining the admissibility of co-conspirator acts and statements pursuant to Rule 810(d)(2)(E). As more particularly set forth *infra,* the facts of this case place the issue in sharp focus.

In *Bourjaily,* the Court alluded to this matter by quoting a portion of the Advisory Committee Note to Rule 104(a):

> "If the question is factual in nature, the judge will *of necessity* receive evidence pro *and con* on the issue. The rule provides that the rules of evidence in general do not apply to this process. *Bourjaily, supra,* fn. 2 (emphasis added).

The trial court's refusal to admit evidence proffered by Petitioner in the case at bar, clearly calls into question this assertion of "necessity", and allows the Court to consider the nature and extent of any "*right*" which would *require* a trial court to receive

evidence ("con") offered by a defendant on the issue of the admissibility of 801(d)(2)(E) acts and statements.

Petitioner makes this suggestion out of an expectation that the Court's "highlighting" of the Advisory Committee note in *Bourjaily* will cause the attention of counsel to be focused upon that procedure, especially among members of the criminal defense bar. Thus the Court could provide guidance and, if appropriate, guidelines for the assistance of district courts and counsel in resolving these complexities which are inherent in the interplay of Rules 104(a) and 801(d)(2)(E).

Subsidiary issues which may be expected to arise in the near future include:

(1) Must the trial court receive relevant evidence outside of the jury's presence, pro and/or con, which is not competent for consideration on the ultimate issue of guilt or innocence? e.g. grand jury testimony, *United States v. Andrus*, 775 F.2d 986 (7th Cir. 1985); May affidavits or statements of persons who *are* available to testify be considered? May a defendant introduce prior convictions, otherwise inadmissible, or evidence of specific instances of conduct not ordinarily admissible under Rule 608(b) of the Federal Rules of Evidence, for the purpose of impeaching or calling into question the credibility of Government witnesses?

(2) Does a defendant have a *right*, under Rule 104(a), to testify outside of the presence of the jury, for the limited purpose of contesting the admissibility of Rule 801(d)(2)(E) acts and statements?

The seriousness of this issue was stressed by the First Circuit in *United States v. Ciampagliai*, 628 F.2d 632, 638 (1st Cir.), cert. denied 449 U.S. 956, 1038 (1980), "It is not difficult to imagine a case in which the basic question of whether a conspiracy existed could be greatly or even dispositively affected by the defendant's evidence." Therefore, in light of the dicta in *Bourjaily* with respect to a party's right or opportunity to present evidence pro and *con* under Rule 104(a), the Court should grant the writ sought by Petitioner in order to more firmly establish the existence and delineate the extent of any such right or opportunity.

II

THE TRIAL COURT'S EXCLUSION OF EVIDENCE OFFERED BY PETITIONER ON THE PRELIMINARY QUESTION OF THE ADMISSIBILITY OF POST-1979 CO-CONSPIRATOR ACTS AND STATEMENTS, AND THE SUBMISSION OF SUCH POST-1979 EVIDENCE TO THE JURY, DENIED PETITIONER HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL

The adoption of Rule 104(a) of the Federal Rules of Evidence perpetuated the orthodox rule that the trial judge alone shall determine preliminary facts. The rationale for this rule was summarized by Professors Wright and Graham:

> "The jury is likely to be less able or willing than the judge to administer the hearsay rule so that even if we require them to return a special verdict on the admissibility of the statement, we can never be sure that they did what the rule requires. Moreover, if the jury must decide every disputed question of preliminary fact, the instructions they must receive will be awesome. In short, about the only good thing that commentators have found in jury determination of preliminary questions is that it is likely to amount to a de facto repeal of the rules of evidence." Wright and Graham, Federal Practice and Procedure, Evidence, Vol. 21, § 5053, p. 249.

In *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978), the United States Court of Appeals for the Eighth Circuit established explicit guidelines and requirements for the trial court to follow in complying with its duties under Rule 104(a) when determining the admissibility of co-conspirator acts and statements offered pursuant to Rule 801(d)(2)(E). Similar procedures were established in the other Circuits; e.g. *United States v. Petroziello*, 548 F.2d 20 (1st Cir. 1977); *United States v. James*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979) (en banc); *United States v. Enright*, 579 F.2d 513 (9th Cir. 1979).

Yet despite the development of such procedures to effectuate the provisions of Rule 104(a) in determining preliminary questions of admissibility, parallel lines of cases have developed in

each Circuit which countenance substantial deviations from these guidelines and requirements, so long as the result was not "prejudicial". The appellate courts have developed a myriad of reasons and bases to justify the trial courts' failures in this regard. For example, many conduct a *de novo* review of the sufficiency of the evidence, in order to cure the error found in the District Court's inadequate procedures; e.g. *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981); *United States v. Monaco*, 702 F.2d 860 (11th Cir. 1983).

The case at bar is unique in that the Court of Appeals held that "[a]lthough we are troubled by the district court's exclusion of Mr. Bybee's testimony on Rockman's behalf, we cannot say that the court's action rises to reversible error." The Court based its conclusion on the somewhat astounding proposition that the district court's error was excused and *cured* because the trial judge allowed the *jury to consider and determine the admissibility* of the post-1979 co-conspirator acts and statements at issue. [A-25].[1]

The uniqueness of this holding is not found in the mere fact that the jury was allowed to consider the preliminary question of admissibility. There is a series of cases in which appellate courts have applied what has been termed a "second bite" analysis to situations wherein the trial court has mistakenly submitted the issue to the jury.

The rationale underlying such decisions is that if the trial court expressly made a proper preliminary determination that Rule 801(d)(2)(E) acts or statements should be admitted, or if upon *de novo* review of the record it is found that such a determination *could* have been made by the trial court, it follows that the defendant has not been prejudiced by a second opportunity to argue the inadmissibility of such evidence to the jury.

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[1] The Rule 104(a) determination was submitted to the jury upon the basis of the following instruction by the the trial court: "This is Instruction Number 46. There can be no furtherance of a conspiracy that has ended. Therefore, the declarations of a conspirator do not bind co-conspirators it (sic) made after the conspiracy is ended."

Thus the "second bite" cases turn on the sufficiency of the evidence to support admission of the Rule 801(d)(2)(E) acts and statements *before* the issue is mistakenly and improperly also submitted to the jury. Under this rationale, the appellate court generally finds that the trial court did, in fact, properly decide that the acts and statements should be admitted, or upon *de novo* review of the evidence, finds that the trial court could have made such a finding; e.g. *United States v. Mastropieri*, 685 F.2d 776, 786-790 (2nd Cir.), *cert. denied*, 459 U.S. 1170 (1983); *United States v. Monaco, supra*, 702 F.2d at 878. The lower court in this case made neither finding.

In the case at bar, the Bybee testimony proffered by Petitioner would have been dispositive on the issue of whether the conspiracy ended four years and nine months *prior* to the date which was alleged by the Government in Count One of the indictment. That is, if the object of the conspiracy, "Las Vegas, Nevada . . . gaming interests of Allen R. Glick" had terminated on December 26, 1979, then acts and statements after that date could not possibly have been "during the course of" the conspiracy.

Because of the trial court's erroneous exclusion of the Bybee testimony, this dispositive evidence was not available to the court (which *should* have alone decided the matter) *or* to the jury in determining the preliminary question of the admissibility, under Rule 801(d)(2)(E), of post-1979 co-conspirator acts and statements.

Thus the fallacy inherent in applying a "second bite" analysis to the case at bar lies in the fact that the trial court's erroneous refusal to admit the Bybee testimony, denied to Petitioner a *first* bite. The *harm* which Petitioner suffered was the failure of the trial court to permit him to *introduce* the Bybee testimony into evidence; the *prejudice* lay in the fact that Rule 801(d)(2)(E) acts and statements occuring and made between December 26, 1979 and September 30, 1983 were improperly considered by the jury on the ultimate question of Petitioner's guilt or innocence.

Petitioner has been unable to find any case in which there has been a refusal by the trial court to accept dispositive evidence proffered by a defendant on the preliminary question of admissi-

bility of rule 801(d)(2)(E) statements, nor has he found any appellate decision (other than that herein) in which the court has upheld the admission of co-conspirator acts and statements without specifically determining that the preliminary question was in fact, or upon *de novo* review could have been, properly decided by the trial court.

CONCLUSION

The case at bar is an appropriate one for granting the writ because:

(1) The issue of a defendant's right to introduce relevant evidence upon a Rule 104(a) preliminary question of admissibility of evidence, especially in regard to Rule 801(d)(2)(E) acts and statements, is one which arises with great frequency in the trial courts and upon appeal, and therefore requires immediate clarification, especially in light of this Court's recent decision in *Bourjaily, supra*; and

(2) The trial court's error in this regard was clear, substantial, egregious and highly prejudicial, thereby providing this Court with an appropriate example for a thorough analysis of the question.

Wherefore, Petitioner respectfully prays that the writ to the United States Court of Appeals for the Eighth Circuit issue.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the Eighth Circuit

No. 86-1439
United States of America,
Appellee,

v.

John Peter Cerone,
Appellant.

No. 86-1440
United States of America,
Appellee,

v.

Milton John Rockman,
Appellant.

No. 86-1441
United States of America,
Appellee,

v.

Joseph John Aiuppa,
Appellant.

No. 86-1442
United States of America,
Appellee,

v.

Angelo LaPietra,
Appellant.

No. 86-1443

United States of America,

Appellee,

v.

Joseph Lombardo,

Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: May 11, 1987
Filed: October 8, 1987

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

BRIGHT, Senior Circuit Judge.

John Peter Cerone, Joseph John Aiuppa, Joseph Lombardo, Angelo LaPietra and Milton John Rockman appeal their convictions for conspiracy to travel in interstate commerce and use interstate facilities with the intent to promote and carry on an illegal activity in violation of the Travel Act, 18 U.S.C. §§ 371, 1952, and on seven substantive Travel Act violations. The appellants raise nineteen allegations of error, some collectively, others individually. For the reasons discussed below, we affirm the convictions.

I. BACKGROUND

The indictment charged that the defendants and several unindicted co-conspirators sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and Fremont, in violation of Nevada gaming laws. These casinos were owned by the Argent

Corporation which, in turn, was owned by Allen R. Glick. Glick's purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators obtained control of Argent Corporation by helping Glick to obtain financing and by placing two of their people, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control of the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund along with Roy Williams, a Teamsters official.

The Government charged that the conspirators were able to control Argent and the Union because they were members of organized crime "groups" in various Midwestern cities. Aiuppa was the boss of the Chicago group, with Cerone as its underboss. LaPietra and Lombardo were members of the Chicago group, and Rockman was an associate of the Cleveland group.[1]

At trial, the Government introduced the testimony of Glick, Angelo Lonardo, a Cleveland underboss, Roy Williams and Carl Thomas, among others. The Government also produced evidence consisting of tape recordings, notes made by DeLuna, and surveillance testimony by FBI agents.

According to the Government's theory of the case, in early 1974, Frank Balistrieri agreed to help Allen Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Nick Civella and Milton Rockman, who each controlled a trustee of the pension fund. Glick then received his loan.

After Glick bought the casinos, Balistrieri and the others required Glick to promote Frank Rosenthal to a management position at Argent. Rosenthal supervised the skim-

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[1] Co-conspirator Nick Civella headed the Kansis City group, and co-conspirator Frank Balistrieri was the head of the Milwaukee group.

ming of gambling proceeds from the casinos. Later, Carl Thomas was placed in charge of the operation for a short time.

Initially, the Kansas City, Milwaukee and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose between the groups, and the Chicago group stepped in to resolve the problem. Thereafter, the Chicago group, including appellants Aiuppa, Cerone, Lombardo and LaPietra shared the skimming proceeds.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. LaPietra became DeLuna's contact with the Chicago group after the death of a previous contact. Appellant Rockman also acted as a contact with DeLuna for the Cleveland group, and as an intermediary with the Chicago group.

Typically, the skimmed money was delivered from Las Vegas to Chicago. LaPietra delivered the skimmed money to Anthony Chiavola, Sr. of Chicago who, in turn, delivered the skimmed money to DeLuna for the Kansas City group and gave the Cleveland group's share to appellant Rockman.

During the period 1976 to 1979, Rosenthal had various widely publicized problems with the Nevada licensing authorities, who considered him to be unsuitable for working as a key employee of a casino. The conspirators were concerned that Rosenthal's problems might jeopardize their interests in Las Vegas casinos and in the skimming operations, and they had numerous conversations about replacing Rosenthal. During the same period, the conspirators also had problems with Allen Glick who was reluctant to accept their control of Argent through Rosenthal. Nick Civella and Carl DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal's direction. Glick yielded to their demands.

In October 1977, independent investment managers took over management of the pension fund's assets, which hindered the conspirators' ability to control the pension fund, to obtain loans and receive other favorable treatment. Thereafter, the conspirators, principally appellant Lombardo and Allen Dorfman, had numerous strategy discussions concerning their efforts to replace the independent managers and other individuals with persons controlled by the conspirators. From 1979 to 1981, the conspirators, including appellants Aiuppa, Cerone, Lombardo and Rockman, took measures to support Roy Williams to succeed Frank Fitzsimmons as Teamsters president and later to support Jackie Presser to succeed Williams in order to maintain the conspirators' influence with the Teamsters Union.

In 1978, DeLuna told Allen Glick that his "partners" were "sick of" dealing with him and that they would kill him unless he sold Argent Corporation. Thereafter, Glick publicly announced his intention to sell Argent and three groups began to negotiate with Glick to buy Argent. In December 1979, Glick sold Argent to Trans-Sterling, Inc.

From March 1978 to May 1980, law enforcement officials conducted many court authorized electronic surveillances of various telephones and locations in Kansas City, Missouri; Leavenworth, Kansas; Las Vegas, Nevada; Chicago, Illinois; and Milwaukee, Wisconsin, including the residences of Carl DeLuna, Anthony Civella, Joe Agosto, and Anthony Chiavola, Sr., and the business offices of Allen Dorfman. Lombardo, Rockman and LaPietra were intercepted during the electronic surveillances.

Law enforcement officials also conducted various court authorized searches and seizures of records and documents. For example, on February 14, 1979, officials seized address and phone books, papers, and other documents from Carl DeLuna's home in Kansas City, Missouri, which contained DeLuna's notes of meetings and telephone conversations among the conspirators, telephone numbers and disbursement of funds in connection with the skimming operation (hereinafter "the DeLuna notes").

On September 30, 1983, a grand jury in Kansas City, Missouri, returned an eight-count indictment against fifteen defendants, charging them with violations of 18 U.S.C. §§ 2, 371, 1952. Carl Civella, Peter Tamburello, Anthony Chiavola, Sr. and Anthony Chiavola, Jr. entered guilty pleas prior to trial. The district court[2] severed the case of Anthony Spilotro from the others, and he died several months after trial. Carl DeLuna and Frank Balistrieri pled guilty during trial. The court dismissed the indictment against Carl Thomas during trial, and he then testified as a government witness. After the close of the government's case, the court entered judgments of acquittal as to John and Joseph Balistrieri.

After a four-month trial, the jury returned guilty verdicts on all counts against the remaining defendants, Aiuppa, Cerone, Lombardo, LaPietra and Rockman. Aiuppa and Cerone were sentenced to consecutive prison terms totalling twenty and one-half years. Lombardo and LaPietra received consecutive sentences totalling sixteen years imprisonment. Rockman also received consecutive sentences, totalling twenty-four years. Each defendant was fined $80,000.

II. DISCUSSION

A. Sufficiency of the Evidence on Count I

All five appellants contend that the evidence was insufficient to convict them on Count I, conspiracy to maintain an undisclosed interest in the gaming interests of Allen Glick. They argue that the evidence failed to show their maintenance of a hidden interest. Rather, at most, the evidence showed a common purpose to skim money by extortion, embezzlement or theft. Some of the defendants contend that the evidence showed that they were merely collecting a "finder's fee" for their assistance to Glick in obtaining his pension fund loan.

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[2] The Honorable Joseph E. Stevens, Jr., United States district Judge for the Eastern and Western Districts of Missouri.

When reviewing the sufficiency of the evidence for a criminal conviction, we must view the evidence in the light most favorable to the jury's verdict. *United States v. Randle*, 815 F.2d 505, 508 (8th Cir. 1987); *United States v. Roenigk*, 810 F.2d 809, 813 (8th Cir. 1987). So viewed, we determine that the evidence was sufficient to convict the appellants on count I as charged in the indictment.

Uncontradicted evidence showed that Frank Rosenthal obtained a managerial position with Argent, that he directed the skimming operation at the casinos and that he acted at the direction and for the benefit of the conspirators. Frank Balistrieri, Nick Civella and Rockman obtained this influence over Argent by arranging for Glick to receive the pension fund loan. All the appellants shared in the skimming proceeds and discussed the working of the operation among themselves. As this court held in *United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985), indirect receipt of gambling moneys without the necessary licenses and in violation of state law constitutes a violation of the Travel Act. 763 F.2d at 907. Furthermore, we note that the indictment here is nearly identical to that charged in the *DeLuna* case.[3] We are bound by *DeLuna*'s holding that evidence of the receipt of skimmed moneys from a Nevada casino serves as a sufficient basis to sustain the convictions under the Travel Act indictment. *Id.* at 906-07.

We also reject appellants' argument that a variance in proof existed from what was charged in the indictment. As discussed above, sufficient evidence existed to support the convictions as charged in the indictment. Furthermore, appellants can show no prejudice from any alleged variance. Prior to trial, several co-defendants challenged the indictment, claiming that the charges were the same as those on which they had previously been convicted in the so-called Tropicana case, *United States v. DeLuna*, *supra*. In response, the Government submitted a detailed offer

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[3] *DeLuna* involved skimming from another Las Vegas casino, the Tropicana.

of proof as to what it expected to prove in this case. *United States v. Thomas*, 759 F.2d 659, 664-65 (8th Cir. 1985). With this sort of information, appellants can claim no prejudice or surprise from the evidence presented at trial.

B. *Pinkerton* Instruction

The appellants were indicted as aiders and abettors on seven substantive counts of violating the Travel Act. The court instructed the jury on theories of aiding and abetting, as well as vicarious liability under the doctrine of *Pinkerton v. United States*, 328 U.S. 640 (1946).[4] Appellants argue that the district court erred in submitting both theories to the jury. They contend that the evidence was insufficient to convict them of aiding and abetting. Consequently, the jury must have found them guilty by reason of vicarious liability. This, they claim, is improper because they cannot be convicted as principals under vicarious liability when they were indicted as accessories under an aiding and abetting theory.

Even assuming that the evidence failed to prove aiding and abetting, we do not agree with appellants' argument. Other circuits have held that persons indicted as aiders and abettors may be convicted pursuant to a *Pinkerton* instruction. *United States v. Meister*, 762 F.2d 867, 878 (11th Cir.), *cert. denied*, 106 S. Ct. 579 (1985); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). Although appellants' argument may have some logical appeal, clearly the law fails to support their position.

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[4] Under *Pinkerton*, a party to a continuing conspiracy may be responsible for substantive offenses in furtherance of the conspiracy even though that party does not participate or know of the substantive offenses.

C. Double Jeopardy

Appellants claim that their convictions for conspiracy and for substantive acts taken in furtherance of the conspiracy under a theory of vicarious liability violate the Double Jeopardy Clause of the Constitution.

It is well settled that no double jeopardy violation occurs when a person is convicted of conspiracy and a substantive overt act of the conspiracy. *Albernaz v. United States*, 450 U.S. 333, 344-45 n. 3 (1981); *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975). That the substantive conviction was obtained through a *Pinkerton* instruction is irrelevant. Rather, the focus must be on the offenses and whether each offense requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also Albernaz*, 450 U.S. at 337-39; *Whalen v. United States*, 445 U.S. 684, 691-93 (1980).

The elements of criminal conspiracy (count I) are: (1) an agreement to commit an illegal act; (2) an unlawful objective; and (3) an act done in furtherance of the conspiracy committed by at least one of the participants. *United States v. Raymond*, 793 F.2d 928, 931-32 & n. 3 (8th Cir. 1986).[5]

Counts II through VIII allege violations of 18 U.S.C. §§ 2, 1952, the elements of which are: (1) aiding and abetting; (2) the interstate travel or use of interstate facilities; (3) with intent; (4) to promote or manage an unlawful activity; and (5) the actual or attempted promotion or management of the unlawful activity. 18 U.S.C. §§ 2, 1952.[6]

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[5] Count I alleged that appellants conspired to use interstate facilities to carry on the unlawful activity of maintaining an interest in the gambling operations of Allen Glick and indirectly receiving gambling proceeds without being licensed in violation of Nevada gaming laws. Appellants obtained this interest through their control of the Teamsters Union Pension Fund.

[6] Count II alleged that appellants aided and abetted Anthony Chiavola, Sr. on October 7, 1978 to travel and distribute unlawful gambling proceeds.

(Footnote continued on following page)

Upon analyzing the elements of the offenses, it is apparent that conspiracy includes an element that the substantive offense does not; namely, an agreement. Appellants, however, argue that the convictions violate the Double Jeopardy Clause because (1) under the *Pinkerton* theory of liability, conspiracy is an element of the substantive offenses, and (2) aiding and abetting requires or at least implies an agreement. Thus, under either of these arguments, double jeopardy is violated because each offense requires identical elements to be proven.

We cannot accept appellants' first argument. *Pinkerton* itself disposed of their argument. The Court there held that convictions for conspiracy and substantive acts committed in furtherance of the conspiracy do not violate the Double Jeopardy Clause, even though the substantive con-

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[6] *continued*

Count III alleged that appellants aided and abetted Anthony Chiavola, Sr. on December 21, 1978 to make arrangements via telephone for meeting to discuss their interests in the gambling operation.

Count IV alleged that appellants aided and abetted Carl Thomas on November 13, 1978 to discuss by telephone with Nick Civella the operation of the unlawful gambling activity.

Count V alleged that appellants aided and abetted Carl DeLuna on November 16, 1978 to telephone and discuss a proposed change of ownership of Glick's casino with Joseph Agosto and the continuing receipt of unlawful gambling proceeds.

Count VI alleged that appellants aided and abetted Carl DeLuna on November 20, 1978 to telephone Joseph Agosto and discuss the unlawful skimming operation.

Count VII alleged that on January 11, 1978, John Cerone travelled to Kansas City to meet with Carl Civella, Carl DeLuna and Nick Civella to discuss the sale of Glick's casinos and their continuing skimming operation, and that the other appellants aided and abetted this act.

Count VIII alleged that appellants aided and abetted Carl DeLuna on January 16, 1979 to telephone Joseph Agosto and discuss a message to Joseph Aiuppa, the visit of John Cerone, Glick's casinos and the unlawful skimming operation.

viction was obtained solely by means of participation in the conspiracy. *Pinkerton*, 328 U.S. at 646-47. We are bound by *Pinkerton*.

Appellants' second argument in this regard is somewhat more difficult. They contend that the substantive offenses also require proof of an agreement because aiding and abetting implies that at least two people are involved and agree to be involved.[7] Thus, the substantive offenses and the conspiracy count require the same elements to be proven.

However, as the Supreme Court noted in *Iannelli*, agreement remains the essential element of (conspiracy) crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact. 420 U.S. at 777, n.10.

Appellants are essentially advancing the application of Wharton's Rule, which requires merger of the substantive offense and the conspiracy when the substantive crime requires two or more persons for its commission. *Iannelli v. United States*, 420 U.S. 770, 773 & n. 5 (1975). The Rule itself does not rest on double jeopardy principles. *Id.* at 782. The Supreme Court has determined that Wharton's Rule is merely an aid in determining whether Congress intended to create separate offenses. *Id.* at 786. The Court noted that the crimes to which Wharton's Rule classically applied have three general characteristics: (1) general congruence of the agreement and the substantive offense; (2) the parties to the agreement are the only ones who commit the substantive offenses; and (3) the consequences of the substantive crime rest on the parties rather than society while the conspiracy does not pose the threats to society that the law of conspiracy seeks to avoid. *Id.* at 782-83.

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[7] Except for count II, the substantive offenses by themselves require two or more individuals to act together and thus imply an agreement.

Using these factors and examining legislative intent, the *Iannelli* Court analyzed a closely analogous offense to that charged here, 18 U.S.C. § 1955. The Court determined that Wharton's Rule does not apply to section 1955. Furthermore, the legislative intent behind the Organized Crime Control Act of 1970, of which section 1955 is a part, demonstrates a clear legislative judgment to punish conspiracy and the substantive offense as separate crimes. *Id.* at 791.

Applying these considerations to the present case, it is clear that Wharton's Rule does not operate to merge the conspiracy and the substantive offenses. Although the parties to the agreement are the same as those committing the substantive crimes, the conspiracy and substantive offenses are not generally congruent. The conspiracy contemplates a scheme much greater in scope than that encompassed by the substantive offenses. Furthermore, the consequences of the substantive crimes do not rest solely on the parties, rather society at large is affected.

Most importantly, the legislative history underlying the Travel Act indicates that Congress did not intent conspiracy to merge with aiding and abetting a Travel Act offense. The Travel Act was enacted to provide federal assistance in the prosecution of organized crime. H.R. Rep. No. 966, 87th Cong., 1st Sess. 2, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2665. Congress specifically intended that the Travel Act be prosecuted in conjunction with the aiding and abetting statute so that those who directed others to carry out their illegal missions could be prosecuted. H.R. Rep. No. 966, 87th Cong., 1st Sess. 3, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2666. In addition, conspiracy was proposed as an element of section 1952, but was rejected. 107 Cong. Rec. 13,943 (1961). Accordingly, we believe Congress intended that aiding and abetting a Travel Act offense be a separate offense from conspiracy, and double jeopardy principles are not violated by a prosecution for both offenses.

Thus, under either theory presented by appellants, the Double Jeopardy Clause has not been violated.[8]

D. Jury Instruction

Appellants argue that the district court erroneously instructed the jury on intent. Specifically, they contend that the following instructions are erroneous:

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement or act made or done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

Jury Instruction No. 74; and

> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

Jury Instruction No. 76.

Appellants contend that these instructions impermissibly shifter the burden of proof from the Government to the

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[8] Nevertheless, we are troubled by the multiple sentences for convictions which, in essence, stemmed from the same activities, i.e., proof of Travel Act violations also serve as proof of the conspiracy. The district court may wish to reexamine its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences.

defendants and thus violated their due process rights. We do not agree.

First, Instruction No. 74 merely instructs the jury that it may find that a person intends the natural and probable consequences of his knowingly done acts. The creation of this inference does not necessarily violate due process. *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985); *see also Sandstrom v. Montana*, 442 U.S. 510, 515 (1979). The challenged instruction violates due process only if "the conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Id.*

Applying this standard to the present case, it is clear that Instruction No. 74 does not relieve the Government of its burden to prove intent. Rather, it allows the jury to make an inference as to intent. Furthermore, the instruction immediately reminds the jury that the inference is merely permissive and that "it is entirely up to [the jury] to decide what facts to find from the evidence." Accordingly, Instruction No. 74 does not violate appellants' due process rights.

Instruction No. 76 presents a more difficult issue. Appellants contend that because the Travel Act offenses are specific intent crimes, the district court erred when it instructed the jury that every person is presumed to know the law.

Although we agree with appellants that the substantive Travel Act offenses are specific intent crimes, it does not follow that the challenged instruction is erroneous. The Government need not show that appellants knew that a law existed to penalize their conduct. *United States v. Golitschek*, 808 F.2d 195, 202 (2d Cir. 1986). Sometimes, however, a specific intent crime requires that the defendant have knowledge of a legal requirement. *Id.*

In this case, appellants present a difficult issue. Knowledge of the licensing requirements under Nevada law would appear to be required for the Travel Act offenses. Instruction No. 76, however, seems to negate the Government's burden of proof in this regard.

Assuming that this instruction is erroneous, we must examine the record to determine whether such an error is harmless. *Rose v. Clark*, 106 S. Ct. 3101, 3107 (1986). Reviewing the record as a whole, we cannot say that the appellants received an unfair trial or that this error affected the composition of the record. The challenged instruction did not create a conclusive presumption, and another instruction advised the jury that the Government had to prove that appellants "knowingly did an act which the law forbids, purposely intending to violate the law." Jury Instruction No. 73. Moreover, the Government adduces ample evidence for the jury to find specific intent. Thus, in light of the record as a whole, any error in the jury instruction that may have introduced a confusing element as to the Government's burden of proving specific intent amounts to harmless error in this case.

E. Disclosure of Informants

Appellants argue that they were deprived of a fair trial because the district court refused to disclose the identity of two confidential informants. Prior to trial, the appellants asked for the identity of the informants and any statements they made, stating that such information "may be relevant and helpful to the defense."

The district court examined various statements and reports *in camera* and also interviewed one of the confidential informants. The court found that one informant did not convey any information to the FBI that was relevant or helpful to the defense. The other informant conveyed information that was used by the FBI to establish probable cause for court-ordered surveillance. The court concluded that disclosure was not required in light of the circumstances of this case, the need for the informants' safety and the information they conveyed.

The district court did not abuse its discretion by refusing to disclose the identity of the confidential informants. In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court stated the governing test for disclosure.

When disclosure of an informant's identity would be material and helpful, the public interest in protecting the flow of information is overcome. *Id.* at 60-62. The defendant has the burden of showing materiality. *United States v. Grisham*, 748 F.2d 460, 463-64 (8th Cir. 1984). Because such a showing may be difficult, the district court may hold an *in camera* proceeding to determine materiality. *Id.* at 464.

In the present case, the appellants only speculated that the confidential informants could provide them with relevant and helpful information. Nonetheless, the district court examined the confidential information *in camera* and concluded that disclosure was not warranted. In reaching its conclusion, the court correctly applied the *Roviaro* test and looked to the circumstances of the case. Accordingly, the district court did not abuse its discretion when it refused to order disclosure of the informants' identity.[9]

We are troubled, however, by the Government's admission on appeal that one of the informants actually testified at trial. This admission apparently came as a surprise to the appellants. The Government, however, has indicated that it informed the appellants at trial that one of the witnesses was a confidential informant.

This incident does not warrant reversal of appellants' convictions. The Government provided all the necessary information to defendants prior to the witness' testimony, and the defendants conducted a thorough cross-examination. Appellants have demonstrated no prejudice from the Government's later use of an undisclosed confidential informant as a witness. Accordingly, the district court's refusal to disclose the informant's identity and the Gov-

[9] In addition, other relevant factors relating to the safety of the witnesses cautioned against disclosure. In 1982, Frank Rosenthal's car was bombed. In 1983, Allen Dorfman was shot and killed. In 1986, the bodies of co-defendant Anthony Spilotro and his brother were discovered in an Indiana cornfield. In light of the physical danger of the informants and the lack of materiality, the court's decision reflects an appropriate balancing of interests.

ernment's subsequent disclosure that one of the informants testified does not constitute any reversible error.

Admission of Uncharged Crimes

Appellants argue that in numerous instances the district court erroneously admitted evidence of "other bad acts." Among other things, appellants challenge the admission of the statement that Allen Dorfman "was shot dead on the street," and prosecution's presentation of testimony by Angelo Lonardo, Ken Eto, Roy Williams and Aladena Fratianno. In this argument, the defendants also allege error in the introduction of the DeLuna Notes that were also admitted at the prior Tropicana trial.

These contentions lack merit. Appellant Lombardo's counsel elicited the statement about Dorfman and no objection was made. Improper testimony by Lonardo was stricken from the record, and the court properly instructed the jury to disregard Lonardo's improper responses. The testimony of Williams, Eto and Fratianno did not implicate appellants in other crimes. Although the DeLuna notes were admitted in another trial to prove a different conspiracy, the notes admitted in the present case were relevant to prove the conspiracy charged. There is nothing impermissible in using the same evidence to prove two separate crimes. Evidence that is probative of the crime charged and not relevant solely to uncharged crimes is not "other crimes" evidence. *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir. 1985). We determine that the district court committed no error as to the challenged evidence.

G. Admission of Co-Conspirator Statements

All the appellants argue that insufficient evidence independent of co-conspirator statements existed and thus the co-conspirator statements, including the DeLuna notes, should not have been admitted. Without these statements, appellants argue that insufficient evidence exists to support their convictions.

We note that the admissibility of co-conspirator statements is determined by the trial judge and he may consider any relevant evidence in this determination, including the hearsay statements sought to be admitted. *Bourjaily v. United States*, 107 S. Ct. 2775, 2780-82 (1987). Furthermore, the trial court need only determine that a conspiracy existed and that a defendant participated in it. The court is not required to independently inquire into the reliability of the co-conspirator statement. *Id.* at 2782-83.

Accordingly, appellants' argument that the co-conspirator statements should not have been admitted because no independent evidence existed to show a conspiracy, and their participation in it, must be rejected.[10] Thus, the evidence, when viewed in the light most favorable to the Government, is sufficient to support appellants' convictions.

H. Admission of DeLuna Notes

Appellant Aiuppa argues that the DeLuna notes were improperly admitted against him. He claims that the notes were not properly authenticated, were not in furtherance of the conspiracy, insufficient independent evidence connected him to the conspiracy, and the notes' admission violated his sixth amendment confrontation rights.

As noted above, *Bourjaily v. United States*, *supra*, disposes of several of Aiuppa's arguments. It is not necessary that solely independent evidence connect Aiuppa to the conspiracy. Rather, the notes themselves may aid in the connection. 107 S. Ct. at 2782. Nor does their admission violate Aiuppa's confrontation rights. Because the notes were admissible as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), *DeLuna*, 763 F.2d at 909, Aiuppa's confrontation rights were not violated. The re-

[10] In addition, we observe that the Government produced direct evidence of the conspiracy and appellants' participation in it. Allen Glick and Angelo Lonardo testified to their personal knowledge of the appellants' activities.

quirements for admission under the Federal Rules of Evidence are essentially the same as the confrontation clause requirements. *Bourjaily*, 107 S. Ct. at 2782.

In addition, the evidence shows authentication of the DeLuna notes. An analysis of the notes seized in a search of DeLuna's home revealed that DeLuna had written the notes. The notes carried DeLuna's fingerprints. Thus, the notes were properly authenticated as declarations of a co-conspirator. *See DeLuna*, 763 F.2d at 908-09; *United States v. Helmel*, 769 F.2d 1306, 1312 (8th Cir. 1985). The notes were also in furtherance of the conspiracy. They documented numerous meetings among the conspirators and other events, which were corroborated by surveillance and testimony of several witnesses. Accordingly, the district court committed no error in admitting the DeLuna notes.

I. Voice Identification

Appellant LaPietra argues that the Government failed to adequately identify his voice in several tape recorded phone calls and accordingly, those tapes may not be used to connect him with the conspiracy.

The district court did not err when it allowed the identification of LaPietra's voice. FBI Agent Thomeczek testified as to his supervision of the recordings and that he listened to all tapes used as exhibits. He also spoke with LaPietra several times after the indictment was issued and testified that the voice in question was that of LaPietra.

Any person may identify a speaker's voice if he has heard the voice at any time. *United States v. Smith*, 635 F.2d 716, 719 (8th Cir. 1980); *United States v. Vitale*, 549 F.2d 71, 73 (8th Cir.), *cert. denied*, 431 U.S. 907 (1977) (per curiam). Minimal familiarity is sufficient for admissibility purposes. Attacks on the accuracy of the identification go to the weight of the evidence, and the issue is for the jury to decide. *Smith*, 635 F.2d at 719; *Vitale*, 549 F.2d at 73.

Accordingly, the district court did not abuse its discretion when it admitted the identification of LaPietra's voice into evidence.[11]

J. Withdrawal of Overt Act 51 From Jury Consideration

LaPietra also contends that the district court erred when it instructed the jury to disregard overt act 51. At trial, it was admitted that LaPietra's voice was misidentified in the phone call constituting overt act 51. LaPietra argues that the court's instruction prevented the jury from considering exculpatory evidence because the misidentification was helpful to his defense.

We cannot agree with LaPietra's contention. The court did not instruct the jury to disregard evidence of misidentification. Rather, the court instructed the jury to consider LaPietra's defense of voice misidentification and to determine whether the identification was reliable under the circumstances. Jury Instruction No. 92. Accordingly, the court did not deprive LaPietra of his defense.

K. Conspiracy Instruction

Appellant Cerone argues that the district court erroneously instructed the jury that the defendants were guilty of conspiracy if they aided and abetted a substantive count. Alternatively, Lombardo contends that the district court erred by failing to limit the aiding and abetting instructions to the substantive counts.

Upon examining the jury instructions, we determine that appellants' arguments are without merit. The court correctly instructed the jury on the elements of conspiracy. The court then explained the three essential ele-

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[11] LaPietra also argues that the evidence failed to show that he drove a car under surveillance on August 16, 1978. This argument is irrelevant because LaPietra was not charged with driving the car. The only relevant event for that date was a meeting among several co-conspirators, one of whom was LaPietra.

ments of the Travel Act so that the jury could consider the objects of the conspiracy. The aiding and abetting language refers to the substantive Travel Act offenses, not conspiracy. Furthermore, the court clearly instructed the jury that the "gist of the offense" was an agreement. Accordingly, the district court did not commit prejudicial error in its conspiracy instructions.

L. Cerone's Conviction on Count VII

Appellant Cerone argues that the evidence fails to prove that he traveled from Chicago to Kansas City for illegal purposes as alleged in count VII of the indictment. He contends that, at most, the evidence showed he traveled from Kansas City to Chicago. Because the evidence failed to support the offense charged in the indictment, Cerone argues that his conviction must be reversed.

Viewed in the light most favorable to the Government, the evidence showed that Cerone lived in Chicago and was observed leaving Kansas City on January 11, 1979 and arriving at the Chicago airport later that day. Earlier the same day, FBI agents observed Carl DeLuna pick up two unidentified men at the Kansas City airport. They later arrived at Anthony Civella's residence. DeLuna later drove Cerone to the airport in the same car observed earlier. In addition, a DeLuna note recorded that DeLuna met with Cerone and Civella on January 11, 1979 to discuss negotiations to buy Argent. Thus, although no direct evidence established the Chicago to Kansas City flight, the circumstances would enable the jury to infer that Cerone traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation. Accordingly, a reasonable jury could convict Cerone on count VII, and we sustain his conviction.

M. Identity of LaPietra's Code Name

LaPietra argues that the district court erred when it allowed FBI Agent Ouseley to testify as an expert wit-

ness and identify LaPietra as having the code name "Pitsacuni." He contends that Ouseley was not sufficiently qualified as an expert and that the evidence failed to support Ouseley's conclusion that LaPietra was "Pitsacuni."[12]

A witness may testify as an expert if the "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue * * *." Fed. R. Evid. 702; *Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723, 728 (8th Cir. 1985). The trial court's determination of whether a witness qualifies as an expert will not be reversed absent an abuse of discretion. *Federal Crop Ins.*, 765 F.2d at 728; *Cashman v. Allied Products Corp.*, 761 F.2d 1250, 1254 (8th Cir. 1985). A witness may be qualified as an expert based on practical experience. *Circle J Dairy, Inc. v. A. O. Smith Harvestore Prods.*, 790 F.2d 694, 700 (8th Cir. 1986); *Federal Crop Ins.*, 765 F.2d at 728.

Agent Ouseley testified that he had been an FBI agent for twenty-five years, had attended training schools, and had previously testified twelve times as an expert on the use of codes. In these circumstances, the district court did not abuse its discretion in allowing Ouseley to testify as an expert.

LaPietra's argument that the evidence did not support Ouseley's conclusion that Pitsacuni was LaPietra's code name speaks to the weight of Ouseley's opinion, not its admissibility. He was thoroughly cross-examined about the evidence upon which he based his opinion. Furthermore, the district court instructed the jury that expert testimony should be considered just like any other testimony and be given whatever weight the jury finds appropriate in light of the expert's qualifications and all the other evidence. Accordingly, we reject LaPietra's claim.

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[12] LaPietra also asserts that the identification is based entirely on co-conspirator hearsay statements and that he is shown to be a member of the conspiracy through these same hearsay statements. As noted above, the trial court may consider hearsay statements in making preliminary determinations concerning admissibility of evidence. *Bourjaily*, 107 S. Ct. at 2780. Accordingly, LaPietra's argument in this regard is without merit.

N. Sufficiency of Travel Act Indictment

Appellant Lombardo alleges that the substantive counts of the Travel Act in the indictment fail to specify the particular acts that the defendants did in furtherance of illegal activity.

We reject Lombardo's contention. Generally, an indictment is sufficient if it sets forth the offense in the statutory language, provided that the statute sets out the necessary elements of the offense. *United States v. McKnight*, 799 F.2d 443, 445 (8th Cir. 1986). Nonetheless, the defendant is entitled to a short, concise statement of facts constituting the offense charged, but he is not entitled to know the evidentiary details with which the government intends to convict him. *United States v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986); *McKnight*, 799 F.2d at 445. In the present case, the indictments contained lengthy statements of fact, and Lombardo clearly cannot claim inadequate notice of the acts with which he was charged. *See supra*, notes 6-7.

O. District Court's Admonition to Lombardo's Attorney

Lombardo argues that he was unfairly prejudiced by the district court's admonition to his attorney, Mr. Oliver, in the presence of the jury. During cross-examination, FBI Agent Palmer testified that he had observed Lombardo driving a red and white vehicle and that he learned the car was registered to Lombardo. Mr. Oliver then asked Palmer "would it surprise you to learn [Lombardo] had never owned a red and white car?" The court then asked Mr. Oliver if he, as an officer of the court, could prove his statement because no evidence of Lombardo's lack of ownership had been entered on the record. The court informed Mr. Oliver that if he could not prove his representation, he would be disbarred and held in contempt. Lombardo contends that this exchange prejudiced him and affected the jury's verdict.

We do not agree. At the next court session, the court gave the jury a curative instruction, stating that the de-

fendant was presumed innocent, was not required to produce evidence, and that the Government carried the burden of proof. The court's instruction served to correct any misunderstanding the jury may have had from the court's prior admonition to Mr. Oliver. Furthermore, the fact in issue, ownership and/or color of Lombardo's car, was not a critical issue. Although the admonition should not have been made in the presence of the jury, these remarks by the court cannot be deemed prejudicial error.

P. Appellant Rockman's Claims[13]

Rockman argues that the district court erred when it ruled on the admissibility of co-conspirator hearsay statements at the close of the Government's case and not at the end of all the evidence. Thus, he contends, statements and acts that occurred after the conspiracy had ended were erroneously admitted.

Rockman's argument alleges that the district court failed to follow the procedures mandated by *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978). He contends that because *Bell* requires the court to rule on the admissibility of co-conspirator hearsay statements at the close of all the evidence, the district court prejudiced his ability to present his defense when it made its ruling at the close of the Government's case. Rockman contends that the court's premature ruling caused it to exclude testimony of Shannon Bybee, a Government witness, who was called by Rockman to testify that Glick had no gaming interests after 1979. Rockman argues that this evidence was crucial because the indictment charged that the illegal objective of the conspiracy was to maintain a hidden interest in the gaming interests of Allen Glick. Because Glick held no

[13] We address Rockman's claims as presented in his substituted supplemental brief. His original brief raised different issues which, although we do not discuss, lack merit. Although this substituted brief raised new issues after the initial briefing, we permitted its filing because of the extraordinary circumstances causing counsel's substitution and in the interest of fairness.

gaming interests after 1979, the district court erred in admitting co-conspirator acts and statements that occurred after 1979.

Initially, we note that it is not per se reversible error for the district court to make *Bell* findings at the close of the Government's case. *United States v. Legato*, 682 F.2d 180, 183 (8th Cir.), *cert. denied*, 459 U.S. 1091 (1982). Rather, we must determine whether Rockman suffered any prejudice from the court's action. *Id.*

Rockman contends that he was prejudiced because he could not establish that the conspiracy ended in 1979 and thus prove subsequent statements inadmissible. Although we are troubled by the district court's exclusion of Mr. Bybee's testimony on Rockman's behalf, we cannot say that the court's action rises to reversible error. In essence, Rockman is alleging prejudice because the evidence varied impermissibly from the indictment. The indictment charged that the conspiracy lasted until 1983. Rockman argues that because the illegal objective was a hidden interest in Glick's gaming interests, the conspiracy ended in 1979 with Glick's sale of his casinos.

As a variance argument, Rockman's challenge is without merit. He had ample and obvious notice that the Government was attempting to prove a conspiracy that endured until 1983. Furthermore, the jury knew of Glick's 1979 sale. The court also instructed the jury that co-conspirator statements made after the end of the conspiracy could be considered only against the person making them. Accordingly, the court did not commit reversible error in this regard.

III. CONCLUSION

For the reasons stated above, we affirm the convictions.

A true copy.

ATTEST:

CLERK U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix B

In The United States District Court for the
Western District of Missouri
Western Division

No. 83-00124-07/08/
09/11/12-CR-W-8

United States of America,
Plaintiff,

vs.

Joseph J. Aiuppa, John Phillip Cerone,
Joseph Lombardo, Angelo La Pietra, and
Milton John Rockman,
Defendants.

[Filed Feb. 2, 1988]

MEMORANDUM AND ORDER

The five named defendants have each separately filed motions variously styled to correct, reduce or modify sentence, all pursuant to Fed. R. Crim. P. 35. In pleadings filed after his original motion, defendant Aiuppa, citing some alleged difficulty in securing copies of medical records from the Bureau of Prisons, asks the court to delay acting on his motion until he has had the opportunity to file the records in question. The court is willing to grant Aiuppa's request for a delay in its ruling on his Rule 35 motion.

Aiuppa has also filed a motion to compel production of medical records to which the government has responded, and counsel for Aiuppa has replied to that response. This particular subdispute drama is now being played out by obdurate lawyers and administrators. It should not be necessary for the court to become involved in the resolution of this relatively routine problem of securing medical records and the request for a hearing on this matter which should be simply and quickly resolved is denied. Obviously the records which it is appropriate to produce under the applicable regulation should be produced and this should be done without further order of the court.

One other matter must be disposed of before the court turns to the Rule 35 motions. Defendant Rockman has filed a "Motion to Stay Action on Rule 35 Motion Until Additional Facts Can Be Presented," asking this court not to act on his Rule 35 motion until conclusion of the trial in the Southern District of New York in which Rockman is a defendant. At the time Rockman made this request the New York trial had been in progress for six months. It proceeded apace for another three months after Rockman's filing of this motion and showed some promise of being concluded in January 1988. Unfortunately the disclosure of jury tampering charges caused a mistrial in New York and the prognosis of a prompt conclusion is no longer realistic. This court cannot and will not wait for the retrial of that case to rule on this defendant's Rule 35 motion and therefore the motion to stay will be denied.

Turning, then, to the motion of the four defendants remaining to be considered, that is Cerone, Lombardo, LaPietra and Rockman, the court is not persuaded that there is any compelling reason to make any substantial change in the sentences originally assessed. It is clear that each of the sentences is within the statutory limits and the only question remaining is whether this court was guilty of a gross abuse of discretion in levying the sentences at issue and in ordering that they be served consecutively. *See United States v. Kirk*, 761 F.2d 463, 465 (8th Cir. 1985) (per curiam).

Addressing this question, all of the defendants take considerable comfort in the language from the Eighth Circuit's opinion in this case where the author said "[t]he district court may wish to re-examine its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences." *United States v. Cerone*, 830 F.2d 930, 946 n.8 (8th Cir. 1987). The court has closely re-examined its imposition of consecutive sentences but, as noted, finds no justification to make major changes in the sentences originally imposed. There is support for this result in *Castaldi v. United States*, 783 F.2d 119 (8th Cir. 1986) where the propriety of consecutive sentences was also questioned. Affirming the District Court's denial of a Rule 35 reduction, the court said "[o]ur power

to review the severity of a criminal sentence is narrowly limited to those rare cases where the district court has 'manifestly or grossly abused its discretion' such that the severity of the sentence 'shocks the judicial conscience.' " *Id.* at 123.

The question then becomes whether there was a gross abuse of discretion by this court in this regard and the answer is that there was not. The United States Supreme Court addressed this question when it said:

> Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes . . . . Unlike some crimes that arise in a single transaction, the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. . . . Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end. . . . Indeed, the Court has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose.

Iannelli v. United States, 420 U.S. 770, 777-78 (1975) (citations omitted).

However, in deference to the footnoted concern of the Court of Appeals, and in order to dispel the possibility of any appearance of unfairness, the sentence as to each of the moving defendants will be modified so as to provide that the sentence as to Count One shall run concurrently with the sentence as to Count Two and that the sentences as to Counts Two through Eight shall run consecutively. Otherwise the defendants' motions will be denied. It is therefore

ORDERED that as to defendants Lombardo, Rockman and LaPietra, the sentences previously announced as to each of said defendants are modified to provide that the sentence announced as to Count One shall run concurrently with the sentence announced as to Count Two and that the sentences as to Counts Two through Eight shall run consecutively. It is further

ORDERED that as to defendant Cerone, the sentence announced as to Count One shall run concurrently with the sentence announced as to Count Two and with so much of the sentence announced as to Count Three as is necessary, and that the sentences as to Counts Two through Eight shall run consecutively. It is further

ORDERED that defendant Rockman's motion to stay action on his Rule 35 motion is denied. It is further

ORDERED that in all other respects the motions of defendants Rockman, Cerone, LaPietra and Lombardo to correct, reduce or modify sentence under Fed. R. Crim. P. 35 are denied. It is further

ORDERED that defendant Aiuppa's request for a delay in this court's ruling on his Rule 35 motion is granted, and that his request for a hearing on the production of medical records is denied.

/s/ JOSEPH E. STEVENS, JR.
Joseph E. Stevens, Jr.
United States District Judge

February 2, 1988

In The United States District Court for the
Western District of Missouri
Western Division

No. 83-00124-07/08/
09/11/12-CR-W-8

United States of America,
Plaintiff,

vs.

Joseph J. Aiuppa, John Phillip Cerone,
Joseph Lombardo, Angelo La Pietra, and
Milton John Rockman,
Defendants.

[Filed Feb. 2, 1988]

ORDER CORRECTING THE COURT'S ORDER OF FEBRUARY 2, 1988

On February 2, 1988 the court issued an order disposing of, *inter alia*, defendant Rockman's "Motion to Stay Action on Rule 35 Motion Until Additional Facts Can Be Presented." On page two of that order, the court erroneously stated that jury tampering charges caused a mistrial in a criminal case in the Southern District of New York in which Mr. Rockman is a defendant. Mr. Rockman is on trial in the Southern District of New York, but that trial did not end in a mistrial and is in fact still in progress. The court was misinformed, and that reference shall be deemed deleted from the court's February 2, 1988 order.

As the court has now learned through Mr. Rockman's counsel, the trial in the Southern District of New York to which the court referred in its February 2, 1988 order will in fact not be concluded for some time; from the information provided the court, that trial will in all likelihood not be completed until the end of February at the earliest. The court's position as outlined in its February 2, 1988 order then remains unchanged: the court finds no good

reason to delay consideration of defendant Rockman's Rule 35 motion on account of the trial now in progress in the Southern District of New York.

IT IS SO ORDERED.

/s/ JOSEPH E. STEVENS, JR.
Joseph E. Stevens, Jr.
United States District Judge

February 3, 1988

Appendix C

United States Court of Appeals
For the Eighth Circuit

No. 86-1440-WM

United States of America,
Appellee,

vs.

Milton John Rockman,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

December 15, 1987

Order Entered at the Direction of the Court:

Clerk, United States Court of Appeals, Eighth Circuit

Appendix D

Supreme Court of the United States

No. A-621

Milton John Rockman,
Applicant,

v.

United States

Order Extending Time to Petition for
Writ of Certiorari

Upon Consideration of the application of counsel for the applicant,

It Is Ordered that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 14, 1988.

s/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 12th day of February, 1988.

Appendix E

The Western District of Missouri

Docket No.83-00124-12-CR-W-8

Defendant

MILTON JOHN ROCKMAN

JUDGMENT AND PROBATION/COMMITMENT ORDER

[Filed March 31, 1986]

In the presence of the attorney for the government the defendant appeared in person on this date, March 26, 1986.

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

[Bryon Neal Fox, (Name of counsel)]

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☒ NOT GUILTY

There being a verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of, from in or before January 1974 through September 30, 1983, conspiring with codefendants and with others to violate 18 U.S.C.

§ 1952 in violation of 18 U.S.C. § 371, as charged in Count One; and of traveling in interstate commerce or using a facility in interstate commerce with the intent to promote, manage, establish and carry on unlawful activities and aiding, abetting, counseling, commanding, inducing and procuring the commission of said offenses, all in violation of 18 U.S.C. §§ 1952 and 2, as charged in Counts Two through Eight of the indictment.

SENTENCE OR PROBATION ORDER—
SPECIAL CONDITIONS OF PROBATION

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby remanded to the custody of the Attorney General or his authorized representative for imprisonment for terms of three years on each of Counts One through Eight to be served consecutively for a total sentence of twenty-four years with parole eligibility to be governed by the provisions of 18 U.S.C. § 4205(a). Defendant is fined $10,000.00 on each of Counts One through Eight for a total fine of $80,000.00 and shall stand committed until those fines are paid or until he is otherwise discharged by law pursuant to the provisions of 18 U.S.C. § 3565. Defendant shall make restitution to the State of Nevada in care of the Nevada State Gaming Control Board in accordance with the provisions of the Victim and Witness Protection Act of 1982 in the amount of $30,750.50 and shall pay court costs in the amount of $32,659.48.

I hereby attest and certify on 1/16/87 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

R. F. CONNOR
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF
MISSOURI

By R. F. CONNOR, Deputy

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a judgment and revoke probation for a violation occurrring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
☒ U.S. District Judge
☐ U.S Magistrate

/s/ JOSEPH E. STEVENS

Dated 3-31-86
DOC # 312

Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1365, 87-1409, 87-1419, 87-1446 and 87-1543

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH JOHN AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ANGELO LAPIETRA, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN PETER CERONE, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

MILTON JOHN ROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court's instruction that everyone is presumed to know what the law forbids and what it requires to be done constituted harmless error.

2. Whether the Double Jeopardy Clause forbids separate convictions and sentences for the offenses of conspiracy to violate the Travel Act, 18 U.S.C. 1952, and a substantive violation of the Travel Act.

3. Whether this Court's decision in *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), should be retroactively applied.

4. Whether the district court improperly precluded petitioner Rockman from offering evidence bearing on the admissibility of certain co-conspirator statements.

5. Whether a defendant who is indicted as an aider and abettor may be convicted as a principal pursuant to *Pinkerton* v. *United States,* 328 U.S. 640 (1946).

6. Whether the district court correctly instructed the jury on the law of conspiracy.

7. Whether the indictment sufficiently alleged violations of the Travel Act.

8. Whether there was sufficient evidence to support petitioner Cerone's conviction on one of the substantive Travel Act counts.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1365

JOSEPH JOHN AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1409

ANGELO LAPIETRA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1419

JOHN PETER CERONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1446

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1543

MILTON JOHN ROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (87-1365 Pet. App. A1-A25) is reported at 830 F.2d 938.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1987. The petition for rehearing and rehearing en banc in No. 87-1543 was denied on December 15, 1987 (87-1543 Pet. App. C1). On February 12, 1988, Justice Blackmun granted an extension of time to and including March 14, 1988, within which to file a petition for a writ of certiorari, and the petition in No. 87-1543 was filed on that date. The petition for rehearing and rehearing en banc in No. 87-1365 was denied on December 16, 1987 (87-1365 Pet. App. B1), and the petition for a writ of certiorari in that case was filed on February 12, 1988. Petitions for rehearing and rehearing en banc in Nos. 87-1409, 87-1419, and 87-1446 were denied on December 23, 1987 (87-1409 Pet. App. B1; 87-1419 Pet. App. B1), and petitions for a writ of certiorari in Nos. 87-1409 and 87-1419 were filed on February 22, 1988 (a Monday). The petition for a writ of certiorari in No. 87-1446 was filed on February 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioners were each convicted on one count of conspiring to travel in interstate commerce and to use interstate commerce facilities with intent to promote an unlawful activity, in violation of 18

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 87-1365.

U.S.C. 371; and on seven counts of traveling in interstate commerce or using interstate commerce facilities to promote unlawful activities, in violation of 18 U.S.C. 1952. Petitioners Aiuppa and Cerone were each sentenced to consecutive terms of imprisonment for four years on the conspiracy count and three and one-half years on each of the substantive Travel Act counts, for a total of 28 and one-half years' imprisonment. Petitioners Lombardo and LaPietra were each sentenced to consecutive terms of imprisonment for two years on each count, for a total of 16 years' imprisonment. Petitioner Rockman was sentenced to consecutive terms of imprisonment for three years on each count, for a total of 24 years' imprisonment. The court imposed cumulative fines of $10,000 on each count as to each petitioner. On February 2, 1988, the district court, pursuant to Fed. R. Crim. P. 35, modified the sentences of Lombardo, Rockman, and LaPietra by requiring their sentences on the conspiracy count (Count 1) to run concurrently with their sentences on the first substantive count (Count 2), but leaving unchanged the consecutive sentences on Counts 2 through 8. The court modified Cerone's sentence by requiring his sentence on Count 1 to run concurrently with his sentences on Counts 2 and 3, but leaving unchanged the consecutive sentences on Counts 2 through 8. The court delayed ruling on Aiuppa's Rule 35 motion. 87-1543 Pet. App. B1-B6. The court of appeals affirmed (Pet. App. A1-A25).

1. The evidence at trial is summarized in the opinion of the court of appeals. It shows that petitioners and others sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and the Fremont casinos, in violation of Nevada gaming laws. The casinos were owned by the Argent Corporation which, in turn, was owned by Allen R. Glick. Glick's

purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators achieved control of the casinos by helping Glick obtain the financing to purchase them and by placing two of their confederates, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control over the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund, and Roy Williams, a Teamsters official. Pet. App. A2-A3.

The conspirators exercised control over Argent and the Teamsters Union by virtue of their membership in organized crime groups in various Midwestern cities. Petitioner Aiuppa was the boss of the Chicago organized crime group, petitioner Cerone was its underboss, and petitioners LaPietra and Lombardo were members of that group. Petitioner Rockman was an associate of the Cleveland organized crime group; co-conspirator Nick Civella headed the Kansas City organized crime group; and co-conspirator Frank Balistrieri was the boss of the Milwaukee organized crime group. Pet. App. A3.

In early 1974, Balistrieri agreed to help Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Civella and Rockman, who each controlled a trustee of the pension fund. After Glick obtained the loan and purchased the casinos, Balistrieri and others required Glick to appoint Frank Rosenthal to a management position at Argent. In that capacity, Rosenthal supervised the skimming of gambling proceeds from the casinos. Initially, the Kansas City, Milwaukee, and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose among the groups, and the Chicago group, including Aiuppa, Cerone, Lombardo,

and LaPietra, began sharing in the skimming proceeds. Pet. App. A3-A4.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. During the operation, LaPietra became DeLuna's contact with the Chicago group. Rockman was DeLuna's contact in the Cleveland group and also served as an intermediary in DeLuna's dealings with the Chicago group. Pet. App. A4.

The skimmed money was ordinarily delivered from Las Vegas to Chicago. LaPietra would deliver the money to a member of the Chicago group who, in turn, would deliver shares to DeLuna for the Kansas City group and to Rockman for the Cleveland group. Pet. App. A4.

During 1976-1979, the conspirators had several conversations in which they discussed replacing Rosenthal, who had become embroiled in widely publicized disputes with the Nevada licensing authorities. During the same period, Glick expressed reluctance to accept the conspirators' control of Argent through Rosenthal. Civella and DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal. Glick yielded to their demands. Sometime later, DeLuna told Glick that his "partners" were dissatisfied, and DeLuna threatened to kill Glick unless Glick sold Argent. In December 1979, Glick sold Argent to another company. Pet. App. A4-A5.

In October 1977, independent investment managers took control of the pension fund assets, hindering the conspirators' ability to control the fund. The conspirators, principally Lombardo and Allen Dorfman, held numerous strategy discussions concerning efforts to replace the independent managers with persons controlled by the conspirators. Between 1979 and 1981, the conspirators, in-

cluding Aiuppa, Cerone, Lombardo, and Rockman, supported Roy Williams to succeed Frank Fitzsimmons as Teamsters president and later supported Jackie Presser to succeed Williams, in an effort to secure influence within the Teamsters' Union. Pet. App. A5.

2. The court of appeals affirmed (Pet. App. A1-A25). The court first held (*id.* at A8) that although petitioners were indicted as aiders and abettors in the Travel Act counts, there was no error in submitting those charges to the jury on a theory of vicarious liability under *Pinkerton* v. *United States,* 328 U.S. 640 (1946). Next, applying the analysis in *Blockburger* v. *United States,* 284 U.S. 299 (1932), the court concluded (Pet. App. A9-A13) that the Double Jeopardy Clause does not forbid separate convictions on the conspiracy and substantive Travel Act counts—even where, as here, liability on the substantive offenses is predicated on *Pinkerton.* The court rejected (Pet. App. A13-A15) on harmless error grounds petitioners' challenge to a portion of the jury charge that stated that "the presumption is that every person knows what the law forbids, and what the law requires to be done" (*id.* at A13). The court next found (*id.* at A17-A18) sufficient evidence to support the admission of the coconspirator statements in the case. In reaching that conclusion, the court applied this Court's recent decision in *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), but also found "direct evidence of the conspiracy and [petitioners'] participation in it" (Pet. App. A18 n.10). The court then upheld (*id.* at A20-A21) the instructions on conspiracy, rejecting as meritless the claim that the trial court had permitted the jury to convict on the conspiracy count if it found evidence that petitioners had aided and abetted a substantive offense. The court next determined (*id.* at A21) that the evidence, although circumstantial,

was sufficient to show that petitioner Cerone had traveled from Chicago, Illinois, to Kansas City, Missouri, for illegal purposes, as alleged in Count 7 of the indictment. The court also concluded (*id.* at A23) that the substantive Travel Act counts in the indictment were sufficient, noting that the indictment contained lengthy allegations of fact and provided ample notice of the acts with which petitioners were charged. Finally, the court held (Pet. App. A24-A25) that petitioner Rockman was not prejudiced by the trial court's exclusion of certain defense testimony regarding Glick's sale of his business interests in 1979—testimony that Rockman had offered purportedly to show that post-1979 co-conspirator statements were not made in the course of the conspiracy, as is required by Fed. R. Evid. 801(d)(2)(E).

ARGUMENT

1. Petitioners first argue (87-1365 Pet. 11-18) that the trial court violated the Fifth and Sixth Amendments when it gave the following instruction (Pet. App. A13):

> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

The court of appeals did not approve of that instruction. Rather, it assumed (Pet. App. A15) that the instruction was erroneous. Applying this Court's decision in *Rose* v. *Clark*, 478 U.S. 570 (1986), however, the court of appeals held that on the present record the error was harmless.

Petitioners acknowledge (87-1365 Pet. 17) that *Rose* v. *Clark*, *supra*, applies, and they do not take issue with the court of appeals' analysis of the record. They simply con-

tend that it is "unclear" (87-1365 Pet. 18) whether the court of appeals found the challenged instruction to be harmless beyond a reasonable doubt. That claim is meritless. Although the court of appeals did not articulate the harmless error standard in so many words, it expressly adopted the analysis employed by this Court in *Rose* v. *Clark, supra.* There is no reason to believe that it did so erroneously.

2. Next, petitioners contend (87-1409 Pet. 8-19; 87-1419 Pet. 18-22) that the Double Jeopardy Clause prohibits separate convictions and sentences for conspiracy and substantive violations of the Travel Act. That contention is mistaken.

This Court has long held that separate convictions and punishments are permissible for ordinary substantive offenses and conspiracies to commit those offenses. See *United States* v. *Feola,* 420 U.S. 671, 693 (1975); *Callanan* v. *United States,* 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States,* 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit the imposition of separate judgments and cumulative punishment. In *Albernaz* v. *United States,* 450 U.S. 333 (1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld

cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez,* 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).[2]

Under that standard, a conspiracy to violate the Travel Act and a substantive violation of the Act are separate offenses and may be separately prosecuted and punished. A conspiracy requires proof of an agreement, while a substantive offense does not; a substantive offense requires proof that the offense was consummated, while a conspiracy does not. The courts of appeals have uniformly

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[2] Citing this Court's decision in *Whalen* v. *United States,* 445 U.S. 684 (1980), petitioners contend (87-1409 Pet. 12-13; 87-1419 Pet. 19-21) that the analysis under *Blockburger* should focus not on the elements of the offense but on the evidence introduced at trial. The *Whalen* case does not alter the traditional test. That case involved a prosecution for the offenses of rape and felony murder. Under the governing statute, felony murder could be committed in the course of any one of six specified felonies, including rape. The defendant was separately punished for both the rape and the felony murder committed in the course of the rape. The government contended that because felony murder could be proved by establishing a predicate other than rape, it followed that under *Blockburger* rape and felony murder could be separately prosecuted and punished. Applying the *Blockburger* test, this Court disagreed. The Court reasoned that the felony murder statute—which listed the six predicate felonies in the alternative—was functionally indistinguishable from a statute that separately proscribed six different species of felony murder under six statutory provisions. The Court therefore regarded each category of felony murder as, in substance, a separate offense, each with its own lesser-included predicate. Under the Court's analysis, therefore, all the elements of rape were included in the offense of felony murder by rape, and under *Blockburger* cumulative punishments would violate the Double Jeopardy Clause. In reaching that conclusion, however, the Court in *Whalen* was careful to point out that it was "not in this case apply[ing] the *Blockburger* rule to the facts alleged in a particular indictment" (445 U.S. at 694 n.8).

reached the same conclusion. See, *e.g., United States* v. *Nickerson,* 606 F.2d 156, 159 (6th Cir.), cert. denied, 444 U.S. 994 (1979); *United States* v. *Polizzi,* 500 F.2d 856, 897 & n.3 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *United States* v. *McGowan,* 423 F.2d 413, 415-417 (4th Cir. 1970).[3]

The analysis is no different even where, as here, petitioners' convictions on the substantive counts may have rested, under *Pinkerton,* on their participation in the conspiracy. To be sure, under *Pinkerton* each co-conspirator becomes liable for the substantive violations committed by his confederates in furtherance of the conspiracy. In that sense, the conspiratorial agreement is a necessary component of substantive liability under the *Pinkerton* theory. But conspiracy does not, for that reason, become a lesser-included offense of the substantive violation: the latter still requires a completed substantive offense, while the former requires the commission of an overt act that may have nothing to do with the substantive act that gives rise to *Pinkerton* liability. Under *Blockburger,* therefore, con-

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[3] Contrary to petitioners' contention (87-1409 Pet. 13-14; 87-1419 Pet. 19-21), the court of appeals' decision does not conflict with any decision of the Sixth Circuit. Indeed, the Sixth Circuit's decision in *Nickerson* is in accord with the decision reached by the court below. To be sure, the Sixth Circuit, in cases such as *Pandelli* v. *United States,* 635 F.2d 533 (1980), and *United States* v. *Austin,* 529 F.2d 559 (1976), has focused upon the actual evidence submitted at trial instead of the elements of the offenses. In a more recent case, however, the Sixth Circuit recognized that "[t]he *Austin* approach has not fared well in the other circuits" (*United States* v. *McCullah,* 745 F.2d 350, 355 n.6 (1984)), and it emphasized that under *Blockburger* separate prosecutions are permissible "when each offense requires proof of a fact that the other does not" (745 F.2d at 355). Moreover, in *United States* v. *Callanan,* 810 F.2d 544, 545-548 (1987), cert. denied, No. 86-6735 (Oct. 5, 1987), the Sixth Circuit reiterated that the *Blockburger* test focuses only on the statutory elements of the charged offenses. See also *United States* v. *Finazzo,* 704 F.2d 300, 305 (6th Cir.), cert. denied, 463 U.S. 1210 (1983).

spiracy and *Pinkerton* substantive liability are separate offenses and may be separately prosecuted and punished. Indeed, in *Pinkerton* itself, this Court upheld separate convictions and punishments for conspiracy and substantive offenses, even though liability on the substantive offenses was predicated on the doctrine of vicarious liability announced in *Pinkerton*. See also *United States* v. *Wylie*, 625 F.2d 1371, 1380-1382 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981).[4]

3. Petitioners claim (87-1409 Pet. 20-24) that this Court's decision in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), should not be retroactively applied. They assert that the court of appeals therefore erred when it relied on *Bourjaily* in finding sufficient evidence to support the admission of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). That contention has no merit.

In the *Bourjaily* case, this Court held that in determining whether a co-conspirator's statement may be admitted pursuant to Rule 801(d)(2)(E), a trial court may consider the statement itself, as well as other "independent" evidence, in assessing whether there was a conspiracy and whether the defendant and the hearsay declarant were members of that conspiracy. The courts of appeals have uniformly followed *Bourjaily* in resolving Rule

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[4] The Fifth Circuit's decision in *United States* v. *Larkin*, 605 F.2d 1360 (1979), modified, 611 F.2d 585, cert. denied, 446 U.S. 939 (1980), is not in conflict. There, the court held that the government could retry a defendant for conspiracy, following a trial in which the jury had been deadlocked on the conspiracy count but had acquitted the defendant on a series of substantive counts in which liability was based on *Pinkerton*. Although the court suggested in dicta (605 F.2d at 1367) that conspiracy may be a lesser-included offense of a substantive offense based on *Pinkerton*, the court did not resolve the issue due to "the procedural posture of th[e] case."

801(d)(2)(E) issues that have arisen since the *Bourjaily* case was decided. See, *e.g., United States* v. *Blackmon,* No. 86-1427 (2d Cir. Feb. 9, 1988), slip op. 6435; *United States* v. *Garner,* 837 F.2d 1404, 1415-1416 (7th Cir. 1987); *United States* v. *Knigge,* 832 F.2d 1100, 1103 (9th Cir. 1987); *United States* v. *Hernandez,* 829 F.2d 988, 993-995 (10th Cir. 1987). Petitioners offer no reason to adopt a different rule.

Moreover, there is no justification for refusing to apply the principles of *Bourjaily* in this case. First, the *Bourjaily* Court did not purport to be creating a new rule, contrary to one on which the defendants had relied. The *Bourjaily* Court simply construed a rule of evidence that has been in effect since 1975. And a rule of evidence of that sort is unlike a substantive rule of criminal liability on which individuals might rely in shaping their conduct. Petitioners do not contend—nor could they—that they engaged in the conduct at issue in this case in reliance on previous circuit law limiting the admissibility of co-conspirator declarations against them.

It would be pointless not to apply *Bourjaily* to this case. If this Court were to hold that the principles of *Bourjaily* should not have been applied on appeal, and if the Court were to reverse on that ground, that would normally entitle petitioners only to a new trial. At the new trial the district court would be obligated to apply the standard announced in *Bourjaily*. There is no reason to set aside a court of appeals' decision where, at any new trial, the legal principle adopted by the court of appeals would necessarily be applied by the trial court as well.

In any event, the present case is an inappropriate vehicle for resolving the issue of the "retroactive" application of *Bourjaily*. The district court (see 87-1409 Pet. 6), affirmed by the court of appeals (87-1365 Pet. App. A18 n.10),

found that there was sufficient independent evidence to justify submitting the co-conspirator statements to the jury. Petitioners' fact-bound challenge to that finding does not warrant further review. See *Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 317-318 & n.5 (1985).

4. Petitioner Rockman contends (87-1543 Pet. 12-18) that the trial court improperly denied him the opportunity to introduce certain evidence that was intended to show that the conspiracy charged in the indictment ended in 1979 and thus that co-conspirator statements made after 1979 should not have been admitted under Fed. R. Evid. 801(d)(2)(E). The court of appeals acknowledged (Pet. App. A25) that it was "troubled" by the exclusion of that evidence, but it held that on the present record the exclusion did not constitute reversible error. That decision is clearly correct.[5]

During the defense case, Rockman attempted to show that the conspiracy charged in the indictment ended on December 26, 1979, when Glick sold his interest in the casinos. At trial, as here (87-1543 Pet. 6-11), Rockman contended that "[t]he object of the conspiracy was inextricably tied to the * * * 'gaming interests of Allen R. Glick' " (*id.* at 7). He asserted that when Glick lost his interest in the casinos, the conspiracy necessarily came to an end. In support of that theory, Rockman called Shannon Bybee as an expert on Nevada gaming laws. Rockman hoped to establish through Bybee's testimony that although Glick held a mortgage on the casinos after he

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[5] The court of appeals did not dispute petitioner's right to offer evidence that the conspiracy ended in 1979. Thus, this case does not present the question whether a defendant may offer evidence bearing on the trial court's preliminary determination, pursuant to Fed. R. Evid. 104(a), whether the factual predicates for the admission of a co-conspirator's statement have been established.

sold them, his stake was insufficient under Nevada law to constitute a financial interest in the casinos. The trial court permitted Rockman to ask Bybee various hypothetical questions concerning the circumstances under which Nevada gaming authorities would require that a mortgage holder obtain a gaming license. The court refused, however, to permit Rockman to ask Bybee three hypothetical questions in that line, holding that the proposed questions omitted material facts and were therefore misleading in the form propounded by Rockman. The court advised Rockman that he could ask those questions if he included the omitted material facts. Rockman failed to do so. Gov't C.A. Supp. Br. 11.

The trial court acted well within its discretion in refusing to permit Rockman to put those improper questions to the witness. In any event, as the court of appeals concluded (Pet. App. A25), any error in excluding Bybee's proposed testimony was entirely harmless. A fair reading of the indictment shows that the object of the conspiracy was to secure and maintain a financial interest in Glick's casinos—an object that did not abate when Glick gave up his personal stake in the operation. See C.A. App. 14. Thus, even if Rockman had succeeded in establishing that Glick had ended his financial interest in the casinos in 1979, the trial court was nevertheless correct in concluding that the conspiracy continued for several years thereafter and that co-conspirator statements made after 1979 were admissible under Fed. R. Evid. 801(d)(2)(E).

5. Petitioners contend (87-1419 Pet. 10-16; 87-1446 Pet. 6-15) that because they were named in the substantive Travel Act counts as aiders and abettors (except for Count 7, in which petitioner Cerone was named as a principal), the trial court erred when it submitted those counts to the jury on the theory that petitioners were liable as principals under *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

In essence, petitioners claim that there was a fatal variance between the charges in the indictment and the theory on which the case was submitted to the jury. That claim is meritless.

The courts routinely hold that a defendant may be indicted as a principal but convicted on evidence showing that he aided and abetted the substantive offense.[6] See, *e.g., United States* v. *Gordon,* 812 F.2d 965, 969 (5th Cir. 1987), certs. denied, No. 86-6801 (June 1, 1987) and No. 86-6870 (June 22, 1987); *United States* v. *Cook,* 745 F.2d 1311, 1315 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Kegler,* 724 F.2d 190, 201 & n.15 (D.C. Cir. 1983) (citing cases). The converse is also true: a defendant may be indicted as an aider and abettor but convicted on evidence showing him to be a principal. See, *e.g., United States* v. *Bryan,* 483 F.2d 88, 94-97 (3d Cir. 1973) (en banc); *United States* v. *Bell,* 457 F.2d 1231, 1235 (5th Cir. 1972); *United States* v. *Scandifia,* 390 F.2d 244, 250 n.6 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969). Consistent with that general principle, the courts have regularly held that defendants may be convicted as principals under *Pinkerton,* even though they were indicted as aiders and abettors. See, *e.g., United States* v. *Meester,* 762 F.2d 867, 878 (11th Cir.), cert. denied, 474 U.S. 1024 (1985); *United States* v. *Redwine,* 715 F.2d 315, 322 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); *United States* v. *Roselli,* 432 F.2d 879, 894-895 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). In the *Meester* case, for example, the court rejected the same claim pressed by petitioners, noting (762 F.2d at 878) that "[t]his is essentially an argument that the *Pinkerton* instruction constituted a variance from the charges con-

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[6] Indeed, the aiding and abetting statute, 18 U.S.C. 2, specifically provide that aiders and abettors are punishable as principals.

tained in the indictment. To benefit from any such variance, the appellants would have to demonstrate prejudice." Accord *Roselli,* 432 F.2d at 895.

In the present case, petitioners do not suggest how they were prejudiced, if at all, by the fact that the substantive Travel Act counts were submitted to the jury on a *Pinkerton* theory of liability. As in the *Roselli* case (see 432 F.2d at 895), petitioners were indicted on conspiracy charges, and thus had notice of, and an opportunity to contest, the essential element of *Pinkerton* liability. Moreover, the only additional factor under *Pinkerton*—whether the substantive acts were in furtherance of the conspiracy—"was not subject to argument in the context of this case" (*Roselli*, 432 F.2d at 895). In the absence of any showing of prejudice, petitioners' variance contention is insufficient.[7]

6. Petitioner Lombardo claims (87-1446 Pet. 15-16) that the instructions on the law of conspiracy were erroneous, in that the trial court "fail[ed] to limit the aiding and abetting instruction to the substantive counts" (*id.* at 15). The court of appeals examined the instructions and rejected petitioner's claim (Pet. App. A20-A21). It noted that the trial court had "correctly instructed the jury on the elements of conspiracy" (*id.* at A20) and that the aiding and abetting instructions "refer[red] to the substantive

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[7] Petitioners' contention (87-1419 Pet. 11-13) that the court of appeals' decision conflicts with *United States* v. *Bright*, 630 F.2d 804 (5th Cir. 1980); *United States* v. *Alsobrook*, 620 F.2d 139 (6th Cir.), cert. denied, 449 U.S. 843 (1980); and *United States* v. *Miller*, 552 F. Supp. 827 (N.D. Ill. 1982), aff'd mem., 729 F.2d 1464 (7th Cir. 1984) (Table), is without merit. None of those cases involved the question whether a defendant who is indicted as an aider and abettor may nevertheless be convicted on evidence showing that he was a principal under *Pinkerton*.

Travel Act offenses, not conspiracy" (*id.* at A21). Lombardo offers no reason to reject that conclusion.

7. Petitioners contend (87-1419 Pet. 6-10; 87-1446 Pet. 17-20) that the Travel Act counts in the indictment did not state an offense. That fact-bound challenge merits no review.

Count 7 of the indictment (C.A. App. 37-38), which is representative of each of the seven substantive Travel Act counts, alleged, in pertinent part, that on or about January 11, 1979, petitioner Cerone traveled in interstate commerce from Chicago, Illinois, to Kansas City, Missouri, for the purpose of meeting with Carl Civella, Nick Civella, and Carl DeLuna

> to discuss matters pertinent to the sale of or transfer of ownership of the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving the management, operation, conducting and carrying on of gambling operations of licensed gaming establishments in Las Vegas, Nevada, that is, the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, and the indirect receipt of moneys played therein, by persons who were not licensed by, and whose interest in said gaming establishments had been concealed from the Nevada Gaming Control Act * * * and regulations of the Nevada Gaming Commission * * * and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of

> said unlawful activity and [petitioners and others] did aid, abet, counsel, command, induce and procure the commission of said offense.

Under Fed. R. Crim. P. 7(c)(1) an indictment need only be "a plain, concise and definite written statement of the essential facts constituting the offense charged." The rule was "designed to eliminate technicalities" and is "to be construed to secure simplicity in procedure." *United States* v. *Debrow,* 346 U.S. 374, 376 (1953). An indictment is ordinarily sufficient if it contains the elements of the offense, fairly informs the defendant of the charge, and enables him to avoid a future prosecution for the same offense on double jeopardy grounds. *United States* v. *Bailey,* 444 U.S. 394, 414 (1980); *Hamling* v. *United States,* 418 U.S. 87, 117-118 (1974). To meet that standard, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished' " (*Hamling,* 418 U.S. at 117, quoting *United States* v. *Carll,* 105 U.S. 611, 612 (1882)).[8]

An indictment under the Travel Act requires an allegation of " '(1) [travel in] interstate commerce or use of an interstate facility, (2) with intent to promote an unlawful activity, and (3) a subsequent overt act in furtherance of that unlawful activity.' " *United States* v. *Brown,* 770 F.2d

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[8] As this Court has put it, " 'the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.' " *Armour Packing Co.* v. *United States,* 209 U.S. 56, 84 (1908) (citation omitted).

768, 772 (9th Cir.) (citation omitted), cert. denied, 474 U.S. 1036 (1985). In this case, each substantive Travel Act count tracked the statutory language and stated each of the prescribed elements. "Because the Travel Act fully and unambiguously sets out the essential elements of the offense, indictments drafted substantially in its language are sufficient." *United States* v. *Stanley,* 765 F.2d 1224, 1239-1240 (5th Cir. 1985). Accord *Turf Center, Inc.* v. *United States,* 325 F.2d 793, 796, 797 (9th Cir. 1963).

8. Petitioner Cerone contends (87-1419 Pet. 16-18) that the evidence was insufficient to support his Travel Act conviction on Count 7. Count 7 alleged that on or about January 11, 1979, Cerone traveled from Chicago, Illinois, to Kansas City, Missouri, to meet with DeLuna, Carl Civella, and Nick Civella, to discuss the sale of the Stardust and Fremont casinos (C.A. App. 37-38). The court of appeals conducted a meticulous review of the record and concluded that the evidence on that count was sufficient (Pet. App. A21). As the court explained, the evidence showed that Cerone lived in Chicago. On January 11, 1979, FBI agents observed Carl DeLuna pick up two men at the Kansas City airport and take them to Anthony Civella's residence. DeLuna later drove Cerone back to the airport in the same car that was observed earlier. Cerone was then seen leaving Kansas City and arriving at the Chicago airport. In addition, notes taken by DeLuna and admitted at trial recorded that DeLuna met with Cerone and Civella on January 11, 1979, to discuss negotiations to buy Argent. That evidence, the court of appeals concluded (*ibid.*), "would enable the jury to infer that Cerone traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation."

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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